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Ribnik v. McBride

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NOTES AND COMMENT

RIBNIK v. MCBRIDE.—“Case law resembles a patch-work quilt; it is strong and serviceable, but to see the pattern you must have distance, while the makers always look at the last patch when putting on a new one; * * *”¹

When the late Judge Hough spoke these words a decade ago, he expressed in apt and homely example the general impression of those intimately familiar with the workings of the judicial process. But to urge the *present* accuracy of this broad charge of myopic development of case law would be to deny efficacy to the labors of the sociological jurists in the very hour of major accomplishment. Yet, were we to restrict ourselves to the subject of Judge Hough's address—the Supreme Court's concept of due process—we should view a field sufficiently circumscribed to permit of cogent generalization, in truth, a field in which the potency of the “last patch” continues unchallenged.

On the eve of its last summer recess, the Supreme Court announced its decision in *Ribnik v. McBride*.² In a paraphrase of its opinion in *Tyson v. Banton*,³ the Court declared unconstitutional that portion of a New Jersey statutory scheme which, in effect, authorized the Commissioner of Labor to reject applications for an employment agent's license upon the ground that proposed fees were excessive. Adherence to the schedule of fees, if and as approved, was made mandatory by the statute; there was, however, provision for amendment.⁴

Ribnik's application for a license had been denied, the Commissioner deeming certain of his scheduled fees excessive and unreasonable. The state courts had sustained both the Commissioner's action and the statutory authority upon which he relied. On review by writ of error, the Supreme Court found constitutional warrant for the justice of Ribnik's complaint.

Tyson v. Banton had obviated much of the Court's difficulty. There it had explained away the *German Alliance Insurance* case⁵;

¹ Hough, *Due Process of Law—To-day*, 32 Harv. L. Rev. 218, 224 (1919). An address delivered at Cornell University May 3, 1918.

² 277 U. S. —, 48 Sup. Ct. 545 (1928).

³ 273 U. S. 418, 47 Sup. Ct. 426 (1927).

⁴ N. J. Laws 1922, C. 227, p. 822.

⁵ 233 U. S. 389, 34 Sup. Ct. 612 (1914). The explanation was achieved by excerpting from the opinion statements of the reason for organized insurance and imputations that insurance contracts had greater public effect than other commercial contracts “whose effect stops with the individuals.” Economics, however, had, years previously, shown that even “individual” losses are thrown upon the community and that the function of systematic insurance is to order these losses. Apparently the magnitude of the business supplied the requisite public interest.

there it had completed the enshrinement of the notion that certain businesses are, and always must be, private in nature and beyond the scope of legislative price regulation. Most significant of all, it had pledged unwavering allegiance to categorical tests of constitutionality—either that the affected industry be one included in Lord Hale's "aphorisms" of two centuries ago; or that circumstances (judicially determined) justify the Court's indulgence of the legal fiction of devotion to the public use, and here too, history in the form of *some* judicial precedents, controls.⁶ New York's attempt to regulate the charges of ticket brokers had fallen before the "tests" of the Court. New Jersey's effort to curb employment brokers was destined to a similar fate, for even the more compelling considerations in favor of the latter regulation could not be expected to prevail against an aphorism and a legal fiction.

The majority opinion, in which, incidentally, but five justices joined,⁷ conceded at the outset the State's power "to require a license and regulate the business of an employment agent." This, however, was immediately qualified by the unjustifiable assumption (first appearing in the *Wolff* case) that price regulation differs essentially from other forms of regulation; and the Court proceeded to apply its "test" of public devotion. It asked, "Is the business one 'affected with a public interest,' within the meaning of that phrase as *heretofore* defined by this Court?" (*Italics ours.*) Under this "standard" which had determined "all the decisions of this Court from *Munn v. Illinois*," the invalidity of the New Jersey enactment became apparent. Emphasis upon lack of precedent, borrowed from the *Wolff* case, and a specious solicitude for freedom of contract, for which we remember the *Adkins* decision, aided the conclusion, but it was the *Tyson* case that clinched the situation. There, observed the Court, "we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld. An employment agency is essentially a private business." "Of course," admitted the Court, "anything which substantially interferes with employment is a matter of public concern"; yet, it perceived "no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employe or an employe for a

⁶ Chief Justice Taft's opinion in *Wolff Co. v. Industrial Court*, 262 U. S. 522, 43 Sup. Ct. 630 (1923) introduced the category to the field of due process. This decision and that of *Adkins v. Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394 (1923) are held in highest respect by the present majority.

⁷ Justice Sutherland wrote for the Court, with the concurrence of the Chief Justice and Justices McReynolds, Van Devanter, and Butler. Justice Sanford, who dissented in the *Tyson* case, concurred upon what he deemed the controlling authority of that decision.

place."⁸ With a final refusal to attach persuasive force to the existence of numerous similar enactments, the task was done—the quilt had another patch, and *Tyson v. Banton*, a congenial neighbor.

For the dissenters,⁹ Justice Stone pointed to the obvious distinction between the regulation here attempted and that considered in the *Tyson* case. He argued strongly for the presumption of constitutionality and for deference to the legislative knowledge of local conditions. As did Justice Brandeis in *Adams v. Tanner*,¹⁰ he made extensive use of available data revealing the trend of informed opinion and establishing the reasonable basis of the legislative action. The baseless distinction between limitation of charges and other regulation he dismissed with the pointed remark that, "The price paid for property or services is only one of the terms in a bargain; the effect on the parties is similar whether the restriction on the power to contract affects the price, or the goods or services sold."¹¹ To round out his argument, he presented a concise review of the leading cases upholding regulatory enactments, and admonished the majority that by its decision it was exempting from legislative price control all but public utilities.

A recent writer said of the majority opinion in the *Tyson* case, "a sense of the actualities, or of a willingness that men of to-day may make the laws of to-day is entirely absent."¹² Of a certainty, the same is true of its prototype, *Ribnik v. McBride*. Here too, a decision is reached through the professed application of long enduring standards. Excerpts from Lord Hale's *De Portibus Maris* provide the "historical test" of the constitutionality of present-day legislation. That the author was there stating the law as it existed in his time when bailment theories bulked large,¹³ and under a different governmental system, seems clear. How his statements justify stifling the expansion of our governmental agencies remains unexplained. The test of devotion to the public interest seems also better suited to explaining a result already achieved.¹⁴ Devotion is indeed fictional, for in none of the instances where the Court found this "devotion" did the complainant have any such intention, else he would not have

⁸ Quoted material appears at 48 Sup. Ct. 545, 546.

⁹ To be sure, Justices Holmes and Brandeis dissented. To read Professor Frankfurter's eulogistic, *Mr. Justice Holmes and the Constitution*, 41 Harv. L. Rev. 121 (1927) is to be convinced of the utter impossibility of the contrary action. Justice Brandeis' able dissent in *Adams v. Tanner*, 244 U. S. 590, 597, 37 Sup. Ct. 662 (1917) should have induced a similar conviction.

¹⁰ *Supra*, note 9.

¹¹ 48 Sup. Ct. at 552.

¹² Robinson, *The Public Utility Concept in American Law*, 41 Harv. L. Rev. 277, 290 (1928).

¹³ The reader will find this point well developed in Robinson, *supra*, at pp. 279-280. There is also there a valuable analysis of judicial development from *Munn v. Illinois*, of how the Court later achieved similar results without finding all the circumstances deemed controlling in the earlier case.

¹⁴ Finkelstein, *From Munn v. Illinois to Tyson v. Banton*, 27 Col. L. Rev. 769 (1927) tersely reveals the artificiality of the Court's professed standards.

been a complainant. Too, definitions of "public interest" must be as various as those who hazard the task. Equally illusory is that "fundamental law" to which the Court appeals when its factual findings convince it that expediency requires the substitution of its own judgment for that of the legislature.¹⁵ A brief reference to the judicial development of the concept of due process should suffice to show that the Court's long-standing tests are, in fact, ephemeral. Before the Civil War, due process was a procedural concept.¹⁶ In the *Slaughter House* cases, it was given scant consideration though Mr. Warren is of the opinion that Federal relief from the arbitrary action of Louisiana's carpet-bag legislature was eminently desirable.¹⁷ Subsequent development has been acutely analyzed by Professor Frankfurter¹⁸—he sees the dissents from the non-interference policy of *Munn v. Illinois* established as majority doctrine with the decision of *Allgeyer v. Louisiana*,¹⁹ and displaced by Justice Holmes' dissent in *Lochner v. New York*²⁰; since the World War, he sees a reversion to the Field-Peckham era.²¹ There have, in short, been no enduring principles formulated in this long conflict between private desire and public authority.

Should deserved attention be given the actualities, it must be apparent that when the present majority strikes down social legislation aimed at a demonstrated evil, it is sanctioning a right to oppress. To set aside a minimum wage law out of solicitude for a necessitous worker's right to contract freely seems the extreme of sophistry.²² To apply an inapplicable (though closest in time) precedent to void the regulation in the *Ribnik* case seems equally unwarranted. But the current trend is toward "the supremacy of the Court over legislation,"²³ and until that trend is arrested by processes extra-judicial, it

¹⁵ In this connection, see Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv. L. Rev. 943, 966 (1927).

¹⁶ Hough, *supra* note 1 at 224.

¹⁷ 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) 258. Paradoxically, the circumstances of the *Ribnik* case called strongly for Federal non-interference.

¹⁸ Frankfurter, *supra* note 9 at 143-144.

¹⁹ 165 U. S. 578, 17 Sup. Ct. 427 (1896).

²⁰ 198 U. S. 45, 25 Sup. Ct. 539 (1905).

²¹ Other turning points are discussed, in Hough, *supra* note 1, and at page 226 he reveals his early impression of the significance of the *Granger* cases, 94 U. S. 155, 164, 179, 180 (1877). Finkelstein, *supra* note 14, emphasizes the departure made in *St. Paul Railroad v. Minnesota*, 134 U. S. 418 (1890); while Brown, *supra* note 15, stresses Harlan's opinion in *Mugler v. Kansas*, 123 U. S. 623 (1887).

²² Thus the Court explains the *Adkins* decision, 48 Sup. Ct. at 546.

²³ Brown, *supra* note 15, has prepared a statistical survey which indicates that since 1920, the Court has invalidated social legislation in 28% of the cases presented. For the years 1913-1920, the figure was approximately 7%. In numbers, the Court invalidated more statutes in the six years following 1920, than in all the fifty-two previous years of the existence of the Fourteenth Amendment. An estimate of the relative social importance of the enactments voided, however, cannot well be presented mathematically.

is fairly certain to continue. Since the political realignment at the close of the war, reaction to all governmental regulation of business has been pronounced, and in that reaction, the Supreme Court has enacted a significant role.²⁴ Complacent acceptance of the catch-phrases of the incumbent political leaders augurs the continuance of judicial supremacy. Only a revision of personnel or, of what is less likely, perspective, will ensure patches of another hue.²⁵ Until then, much remediable exploitation will continue, and those who echo the demand for the *status quo* will unwittingly share the increased cost imposed by lack of foresight.

V. J. K.

SUFFICIENCY OF NOTICE BY PUBLICATION IN FORECLOSURE PROCEEDINGS.—In 1912, a resident of Virginia, executed a mortgage for \$25,000. upon real property situated in Brooklyn, New York. Several years later, after the death of the mortgagor, foreclosure proceedings were instituted by the holders of the mortgage. Application was made to the Supreme Court for leave to serve the non-resident heirs of the mortgagor by publication and an order was thereafter duly entered directing that the summons be published for the requisite number of times in two local newspapers, the "Brooklyn Daily Times" and the "Brooklyn Citizen." The order also required the mailing of copies in accordance with the provisions of the statute.¹ Through an error of a clerk employed by the attorneys for plaintiffs in that action, the advertisement was inserted in the "Brooklyn Daily Eagle" instead of the "Brooklyn Daily Times," one of the two papers designated in the order for publication.

The heirs, all residents of Virginia, failed or neglected to appear and judgment of foreclosure was entered by default, the property bringing but \$10,000. upon the sale. The mistake in publication was not discovered until much later and was not rectified until 1924, when plaintiffs in the foreclosure action procured an *ex parte* order amending *nunc pro tunc* the order of publication so that it read "Brooklyn Daily Eagle" instead of "Brooklyn Daily Times," as originally.

²⁴ Professor Beard in his recent *THE AMERICAN PARTY BATTLE* has directed attention to the resultant conservatism of all branches of government, and particularly (p. 130) to the conservative leadership in the Court.

²⁵ Judge Hough's conclusion of but ten years ago, that "the courts, when invoked to-day under the due-process clause, are doing little more than easing the patient's later days," 32 *Harv. L. Rev.* at 233, is impossible of present application. An entirely reasonable observation at the fiftieth anniversary of the adoption of the Fourteenth Amendment has become unwarranted at the sixtieth, yet the Court insists that "standards" have been maintained.

¹ C. P. A., Sec. 232; General Rules of Practice, 50-52.